



## P R O C E E D I N G S

**THE COURT:** Good morning.

Okay. Mr. Roberts, you're talking on behalf of the Plaintiffs?

**MR. ROBERTS:** Yes, Your Honor. Good morning.

**THE COURT:** Good morning.

**MR. ROBERTS:** On the way to the courthouse this morning, I got word from Mr. Bell. He's had something unexpected come up, and he sends his regrets that he's not going to be able to be here.

Your Honor, there are certain issues that I'm sure we're going to get a little deeper into.

Ms. Butler is here. Kevin Dean with Motley Rice is here and Ms. Laura Baughman. So there certainly will be issues they are going to be addressing.

Judge, I can report to the Court that I think, by and large, we've been getting along, moving the ball down the court. There are a couple of issues that are outstanding that we are going to need to address this morning.

Phase I depositions have been completed. Phase II have all -- Phase II expert depositions have all been scheduled. And we're working closely with the Government to schedule our Phase III specific causation and damages experts.

One issue relates to a Plaintiff, Mr. Mousser. He was originally a kidney client. I'm sure Your Honor has

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1 probably heard of Mr. Mousser.

2 **THE COURT:** Right.

3 **MR. ROBERTS:** He was recently diagnosed with bladder  
4 cancer. So we're working closely with the Government to figure  
5 out how to address this new diagnosis. The Government on  
6 Friday sent its proposal on how to handle Mr. Mousser's  
7 additional diagnosis. We've agreed to allow them to do an IME.  
8 So that's something that I anticipate we'll reach resolution  
9 on.

10 One question that I would like to bring to the  
11 attention of the Court is the issue of supplementation of  
12 information considered by experts. A couple of instances --  
13 after our experts have given their reports, additional  
14 information has come to their attention. There's been  
15 additional scientific studies. What we've done is we've  
16 notified the Government prior to the deposition to allow them  
17 to know, look, he's considered this additional piece of  
18 evidence.

19 **THE COURT:** Before the deposition?

20 **MR. ROBERTS:** Yes, sir, before the deposition.

21 So there's nothing unusual about that, Your Honor.  
22 And, you know, as you know, things happen, new studies come  
23 out, and so forth. So that's another question that the Court  
24 will probably hear about today.

25 We're also doing a quarterly supplement on our

1 profile form. So if anything is ongoing that, you know, we  
2 believe needs to be addressed, you know, we're certainly giving  
3 the Government a heads-up on that.

4 The next three issues on my agenda:

5 One relates to subpoenas on Phase I experts,  
6 Mr. Hennet and Spiliotopoulos. With the Court's permission, I  
7 think Mr. Dean will address that issue.

8 There was also a clawback objection that I'm sure  
9 Your Honor saw in our report. That's another issue from  
10 Mr. Dean.

11 So the final issue relates to the motion to exclude  
12 certain opinions of Mr. Hennet that were based upon his site  
13 visit after the discovery had closed, and I think Ms. Laura  
14 Baughman will address that.

15 So, Your Honor, I'm filling in for Mr. Bell. But  
16 those are the issues that I understand need to be addressed by  
17 the Court this morning.

18 **THE COURT:** Okay. What have you got?

19 **MR. BAIN:** Your Honor, I agree with Mr. Roberts'  
20 agenda for the most part. I will say, with respect to the  
21 Phase I depositions, those are complete, except that we  
22 received some supplemental information from one of the  
23 Plaintiffs' experts, Mr. Maslia, just late last week. And the  
24 Plaintiffs offered to make Mr. Maslia available for an  
25 additional hour of deposition based on that late-submitted

1 material. We are considering that, and we'll be conferring  
2 with the Plaintiffs regarding that.

3 But I think that also goes to the issue regarding  
4 supplementation that Mr. Roberts suggested. Some of these  
5 supplemental materials--considered lists we're getting on the  
6 eve of deposition. So right before the deposition, we're  
7 getting a list of additional materials that the Plaintiffs are  
8 considering.

9 **THE COURT:** Is that pushing back the depo date or the  
10 depo or --

11 **MR. BAIN:** Well, we're considering it on a  
12 case-by-case basis. We're usually going forward with the  
13 deposition and reserving our rights to continue it if we don't  
14 have adequate time to prepare. But we are somewhat troubled  
15 that we're getting these supplements right on the eve of the  
16 deposition.

17 So the other issues Ms. O'Leary and Mr. Carpenito  
18 will be addressing as they come up.

19 **THE COURT:** Okay.

20 **MS. BUTLER:** Your Honor, if you have any concerns  
21 about the late supplementations, I can address more detail.  
22 For example, there was one deponent where an additional study  
23 was noted the night before the deposition. That was  
24 Dr. Gilbert. But that was one study, and we did notify them  
25 before the deposition, rather than being surprised at her

1 deposition, that there's an additional study.

2 The others -- for example, there were deposition  
3 transcripts that were provided that were reviewed after the  
4 rebuttal report. They were new depositions.

5 So we're working through it, and I don't believe  
6 there has been any prejudice or harm. And, certainly, we're  
7 addressing the issue, and we acknowledged the Gilbert issue.  
8 And it hasn't occurred on the eve of deposition. Again, I just  
9 want to make sure you don't think that's a recurrence.

10 **THE COURT:** But all these were occurring before the  
11 deposition; correct?

12 **MS. BUTLER:** Yes, Your Honor.

13 **THE COURT:** All right. I'll hear -- well,  
14 Mr. Roberts, did you say Mr. Dean and Ms. Baughman?

15 **MR. ROBERTS:** Yes, Your Honor.

16 **THE COURT:** I guess I'll hear from Mr. Dean first.

17 **MR. DEAN:** Good morning, Your Honor.

18 **THE COURT:** Good morning.

19 So which issue are you talking about?

20 **MR. DEAN:** I am going to talk about the clawback  
21 issue. There's one email, one document, that has --

22 **THE COURT:** Is this not resolved? I thought in your  
23 report, Mr. Bain, you said that the Plaintiffs said they will  
24 not be using the document. So I just assumed that it was  
25 resolved.

1 Is it not resolved?

2 **MR. DEAN:** Actually, what we said was we would not be  
3 using the document in any depositions or motions practice until  
4 it was resolved. We do need the Court to review the document  
5 in camera. We believe it's not confidential or privileged in  
6 any manner. I believe the DOJ has a different view. So we do  
7 need the Court to review the document in camera, and I have  
8 brought it for the Court.

9 **THE COURT:** So you've got it?

10 **MR. DEAN:** Yes, sir.

11 **THE COURT:** Okay.

12 **MR. DEAN:** It's just one page, front and back.

13 **THE COURT:** Do I need to -- I don't know that I've  
14 got any briefing on this.

15 **MR. DEAN:** Well, that was the other point. We  
16 weren't sure. That's why it's in the scheduling -- I mean, the  
17 status report.

18 **THE COURT:** Right.

19 **MR. DEAN:** We needed some guidance from the Court.  
20 We're happy to brief the issue, a small brief. I'm prepared to  
21 make a little presentation about why it's not privileged. But,  
22 again, we can brief it. It's not --

23 **THE COURT:** What do you want to do? Do you want to  
24 brief it or just tell me?

25 **MR. CARPENITO:** Good morning, Your Honor. Joshua

1 Carpenito with the United States.

2 We're happy to do whatever the Court prefers. We can  
3 certainly address it in chambers after the hearing. I do agree  
4 with Mr. Dean; it's a page and a half, two pages. So I think  
5 we could probably get through it pretty quickly.

6 **THE COURT:** Okay.

7 **MR. CARPENITO:** But if the Court prefers a brief, I'm  
8 happy to do that as well.

9 **THE COURT:** Well, let's see what we can do. Yeah, I  
10 guess I'll receive it and hear from you all.

11 **MR. DEAN:** Right now?

12 **THE COURT:** Whatever you want to do.

13 **MR. DEAN:** Sure.

14 **THE COURT:** Okay. Do you want to tell me about it?  
15 How do you want to proceed? Or do you just want to do this in  
16 chambers?

17 **MR. DEAN:** I've done my part. I was supposed to  
18 tender the document.

19 **THE COURT:** Okay.

20 **MR. DEAN:** I don't see any problem with the document;  
21 but if he wants to talk about it in chambers, I am perfectly  
22 fine to do that as well, Your Honor.

23 **MR. CARPENITO:** Yeah, I believe we would prefer to  
24 discuss it in chambers.

25 **THE COURT:** Okay. We'll talk about it in chambers.



1           **MR. CARPENITO:** Thank you.

2           **THE COURT:** So you're done?

3           **MR. DEAN:** I'm done, Your Honor.

4           **THE COURT:** Oh. All right.

5           **MR. DEAN:** Three and a half hours to hand you one  
6 page.

7           **THE COURT:** Okay. I guess Ms. Baughman?

8           **MS. BAUGHMAN:** Yes. Thank you, Your Honor.

9           I have two issues to discuss with you. The first one  
10 would be the issues on discovery with respect to the  
11 Plaintiffs' subpoena to Dr. Spiliotopoulos and Dr. Hennet,  
12 which is discussed --

13           **THE COURT:** And that's for the billing?

14           **MS. BAUGHMAN:** Yes. And some of this -- that's  
15 correct. It's discussed on page 6 and 7 of the --

16           **THE COURT:** So it's the substance of the compensation  
17 records; it's the compensation records for work performed  
18 before August 2022; and notes, memos, and documents regarding  
19 2005 ATSDR panel; and, fourthly, interview notes and summaries.

20           Correct?

21           **MS. BAUGHMAN:** That's exactly right.

22           **THE COURT:** Okay.

23           **MS. BAUGHMAN:** My understanding regarding the first  
24 two items, which were both compensation records, is that the  
25 DOJ plans to submit -- produce those later this week. So while

1 I think it's clear that we're entitled to those, I'm not sure  
2 that --

3 **THE COURT:** What is it exactly you're saying you're  
4 entitled to? Because the rule just says "statement"; right?  
5 It says "statement." I can think of -- and I found some cases  
6 where it said it wasn't billing records; it was just a  
7 statement, a fee summary --

8 **MS. BAUGHMAN:** Well, I think there's --

9 **THE COURT:** -- is sufficient.

10 **MS. BAUGHMAN:** I'm sorry to interrupt you.

11 The rule says what needs to be provided with an  
12 expert report.

13 **THE COURT:** Right.

14 **MS. BAUGHMAN:** But there's nothing that prevents us  
15 from issuing discovery in addition, right. So we submitted a  
16 subpoena asking for more information than that --

17 **THE COURT:** Right.

18 **MS. BAUGHMAN:** -- including what they did on an  
19 hourly basis, the backup, in other words, for their billing  
20 records.

21 **THE COURT:** So what was the purpose of the subpoena?

22 **MS. BAUGHMAN:** Why do we want that?

23 **THE COURT:** Yeah. For the same purpose as the rule  
24 allows? Because if you're relying on -- if your relevance  
25 argument is the rule allows for it, well, the rule says it's

1 just a statement that you get.

2           **MS. BAUGHMAN:** Our argument would be more than just  
3 that the rule allows it. There are -- there is case law  
4 talking about whether we are entitled to this information in  
5 order to determine how much time the expert put into the report  
6 to get to whether the expert actually really wrote the report  
7 or whether substantial pieces of the report may have been  
8 actually written by the attorney.

9           We believe, based on the content of  
10 Dr. Spiliotopoulos' report and testimony that he's provided,  
11 that it may be that substantial portions of his report have  
12 actually not been written by him.

13           So we want to look at -- so this is for the first of  
14 the four items.

15           **THE COURT:** Well, can't you just ask him that at a  
16 deposition?

17           **MS. BAUGHMAN:** He claims that he wrote it. But I  
18 brought a case from -- a district case from the Fourth Circuit  
19 about this that talks about that's just not enough if there are  
20 underlying issues that indicate that, in fact, maybe the expert  
21 didn't write the report. And saying he did, when there are  
22 indications that he didn't, entitles us to the underlying  
23 billing records.

24           And I will say that on our side the Plaintiff Group  
25 has provided detailed billing records that don't just say this

1 is the amount of money that we paid them, but this is what they  
2 did, you know, on a daily basis, how many hours and what was  
3 done. And on the other side, they're just giving us -- and I  
4 brought the records, if Your Honor would like to see them.

5 **THE COURT:** Was there like a reciprocal agreement  
6 that whatever they would give that you would give?

7 **MS. BAUGHMAN:** To my knowledge, there isn't a  
8 reciprocal agreement on that. But we did issue a subpoena.  
9 They did not issue the same sort of subpoena. And there's  
10 nothing in the federal rules that says that we can't ask for  
11 additional information if it's relevant, and --

12 **THE COURT:** Well, yeah, but Rule 26 is going to  
13 govern; right?

14 **MS. BAUGHMAN:** Right. And if it's relevant  
15 information, we're entitled to it. And what the expert did --  
16 let me -- and I can approach and provide you with a copy of the  
17 billing records, if you would like to see them. They don't  
18 even tell us which person at the company, SSPA, actually did  
19 the work.

20 So it's the same consulting company that employs both  
21 Dr. Hennet and Dr. Spiliotopoulos. And many other people  
22 within their organization did work. We can't even tell what  
23 Spiliotopoulos and Hennet did.

24 **THE COURT:** This is really kind of shaping up like  
25 that *Seaman* case from the Middle District, right, where it

1 was -- I think it was two experts that were being used from a  
2 single company, and Judge Webster -- I think Judge Webster  
3 allowed for the total amount billed attributed to the experts'  
4 work, so more than just the fee rate in the case.

5 **MS. BAUGHMAN:** And I believe in that case you had to  
6 indicate what each person did as opposed to the company --

7 **THE COURT:** Right. It was like a carve-out.

8 **MS. BAUGHMAN:** Correct. Correct.

9 **THE COURT:** Okay. So this is something that you  
10 haven't been able to resolve; correct?

11 **MS. BAUGHMAN:** That's true. But what I started out  
12 by saying is that DOJ has indicated that they're going to  
13 produce records, including records indicating the amount done  
14 per day and the task and that that will be produced later this  
15 week.

16 So for the first two of the four issues that I'm  
17 addressing right now, I believe we should put those on hold and  
18 see what's produced first.

19 **THE COURT:** Okay. And that's a substance issue, but  
20 it's also a time period issue; correct?

21 **MS. BAUGHMAN:** Yes.

22 **THE COURT:** Before August of 2022 and the substance  
23 of the records?

24 **MS. BAUGHMAN:** Correct.

25 There's one issue -- the first issue that's -- we

1 went through four. The first one has to do with what they did  
2 for this case, right. But the background of this -- and this  
3 has some overlap with what Mr. Dean has been talking about --  
4 is that this same consulting company, and, in particular,  
5 Dr. Hennet, has been working on Camp Lejeune-related issues  
6 since at least 2005, and those issues are not related to this  
7 case, okay. I mean, it wasn't in anticipation of this case.  
8 This case wasn't filed until, I believe, 2022. So it couldn't  
9 have been, right. This was more than 15 years before the case  
10 was filed.

11           And we believe that some of this information -- or  
12 some of the work that Dr. Hennet did, based on documents that  
13 DOJ is not claiming are privileged, includes things like  
14 directing where wells should be drilled and what should be --  
15 what contaminants should be tested for. And it appears to us  
16 that that would not be in anticipation of litigation. It looks  
17 like he was actually working on investigation or maybe  
18 remediation of this site. And so to the extent that work is  
19 not in anticipation of litigation, we believe those documents  
20 should be produced and the billing records related to that work  
21 ought to be produced.

22           And this sort of overlaps into -- it goes into the  
23 third issue that I've got on the one through four there. The  
24 third issue has to do with Dr. Spiliotopoulos who -- now, this  
25 is different from the drilling of Dr. Hennet. But, in 2005,

1 Dr. Spiliotopoulos went as an observer, according to him,  
2 according to his deposition testimony, to the 2005 expert peer  
3 review panel that ATSDR put on where it was trying to figure --  
4 it was trying to get feedback on the methodology it was using  
5 for the water molding, okay.

6           So there were two -- there was -- 2005 and 2009 they  
7 did this, two days each time, where they brought in experts  
8 from around the country to provide feedback to them. And  
9 Dr. Spiliotopoulos went to the two-day meeting in 2005 as an  
10 observer, and we believe he took notes, and we believe he  
11 reported back to SSPA about what -- and his supervisors  
12 there -- about what he heard and saw and maybe what his  
13 impressions were.

14           Now, DOJ is claiming work product. Well, work  
15 product is supposed to protect the impressions and the opinions  
16 of attorneys. Dr. Spiliotopoulos testified that he didn't even  
17 know -- to the extent that was for litigation, he wasn't aware  
18 of it. He didn't know what litigation it would have been for.  
19 He was just there to observe and report back.

20           So I don't see how his notes would reflect attorney  
21 observations or attorney thought processes here. He didn't  
22 know what litigation, if any, it was for.

23           And why is it relevant? Well, because if he's saying  
24 something then that contradicts what he says later when he's a  
25 retained expert, that's relevant. That's fodder for

1 cross-examination.

2 And on the flip side, right, Mr. Maslia has been  
3 working from the ATSDR on these issues since 2004, and all of  
4 his notes, all of his emails, all of the work that he did was  
5 produced all the way up through the entire time --

6 **THE COURT:** Didn't you say the same thing about any  
7 lecture he's given or talk about anything that's relevant?

8 **MS. BAUGHMAN:** We've produced everything that we have  
9 on Mr. Maslia.

10 **THE COURT:** I mean, it just -- it seems that this  
11 would be endless -- this would be endless discovery.

12 **MS. BAUGHMAN:** To the -- I don't think there is an  
13 endless amount of work that Dr. Spiliotopoulos did on Camp  
14 Lejeune.

15 Maybe one idea would be for the DOJ to provide a  
16 privilege log so we could see what exactly exists. Also, I  
17 believe under work product, if they're claiming it's in  
18 anticipation of litigation --

19 **THE COURT:** I'm not even talking about privilege.  
20 I'm talking about relevance.

21 **MS. BAUGHMAN:** Relevance would have to do with  
22 cross-examining him on whether he's taking inconsistent  
23 positions now than he did before when he wasn't a retained  
24 expert.

25 **MR. DEAN:** Judge, may I supplement that with just one



1 fact?

2 I took Dr. Hennet's deposition.

3 **THE COURT:** Again, I don't know anything about these  
4 depositions. I don't know anything about the reports.

5 This sounds to me like it's something that would be  
6 in an expert's credentialing, in their CV; right? He gave --  
7 he or she gave a lecture in 2005 about ATSDR. Well, I imagine  
8 they gave a lot of lectures. Experts generally do that.

9 Couldn't you say the same kind of argument about  
10 every single lecture an expert gives, where you would be going  
11 endlessly through their prior experiences of giving lectures  
12 and taking notes on issues, and then you're saying that all of  
13 that would be discoverable because it's germane to the --

14 **MR. DEAN:** Judge, this is a little different, and  
15 I'll try not to get into what we're going to talk about in  
16 chambers. But it is a fact from a Government-sponsored website  
17 called usaspending.gov that the only and first contract between  
18 S.S. Papadopoulos & Associates and the Department of Justice was  
19 only approved and authorized retention and work to be done on  
20 November 30, 2005.

21 Now, Spiliotopoulos and Mr. Hennet are doing work  
22 prior to that date for -- we believe for the Navy, for NAVFAC,  
23 might have been consulting with the Department of Justice. But  
24 only the contract that existed for which these two experts now  
25 in this case could have been billing against was a 2002 General

1 Services Administration \$18 million contract that expired in  
2 2009. So they couldn't have billed their work for the 2005  
3 contract when they did this work, including Mr. Spiliotopoulos.

4 And the only reason we need Mr. Spiliotopoulos' notes  
5 is, like Ms. Baughman said, if I have Mr. Hennet on  
6 cross-examination and he signed an affidavit in a case called  
7 Baby Washington in 2020 where he's utilized ATSDR's findings,  
8 relied upon it, claiming that that Baby Washington was not  
9 contaminated, he's sort of taking an inconsistent position now.  
10 And then for 20 years prior to that, he had access to all this  
11 information, all this data. Mr. Spiliotopoulos showed up at a  
12 working expert panel meeting and never voiced objection, never  
13 said anything over 20 years was wrong with ATSDR's work.

14 That's why Ms. Baughman and I sort of bulldog on this  
15 issue, with all due respect, Your Honor, is to show that these  
16 experts had 20 years to say what they are now saying, and we  
17 need to know exactly what it is they had access to and what  
18 they did back in 2005 through 2022 and who were they working  
19 for.

20 The Spiliotopoulos issue -- I didn't mean to digress,  
21 but the Spiliotopoulos issue is solely his notes and  
22 information he developed at this meeting. He didn't lecture.  
23 He just was at the meeting just taking down notes. He was a  
24 participant. We don't even know who he was participating for.

25 **MS. BAUGHMAN:** Let me be clear about that. He

1 testified that he was there at the request of his superiors,  
2 his boss at SSPA, right, and that he had been asked to go there  
3 as an observer to take notes. He did not know whether it was  
4 for litigation or not. If it was for litigation, he didn't  
5 know what litigation it was for, but he did say that the client  
6 was the Department of Justice.

7           So this is different from something like -- again,  
8 every piece of paper that Mr. Maslia created from 2005 and  
9 earlier and all the way up until he left the ATSDR has been  
10 produced. They have all of it. They have everything he wrote,  
11 everything he thought, everything he said at these meetings.  
12 And we're just asking for -- if they're -- they are the ones  
13 who brought up that Dr. Spiliotopoulos was at that meeting. We  
14 want his notes from that meeting, and it's not work product  
15 because it wasn't for litigation.

16           **THE COURT:** Well, so what? What's in the notes?

17           **MS. BAUGHMAN:** We don't know.

18           **THE COURT:** What do you think is in the notes? Why  
19 do you want them?

20           **MS. BAUGHMAN:** Possibly statements that contradict  
21 what he wrote in his report about the substance of --

22           **THE COURT:** So opinions that he jotted down while he  
23 was listening to a lecture?

24           **MS. BAUGHMAN:** Your Honor, I don't know what he wrote  
25 without seeing it. I think it's relevant what he thought to

1 write down, what he thought was important, what he reported  
2 back in a nonlitigation setting about the same thing he's  
3 talking about now.

4 **THE COURT:** Okay. So that was three and four?

5 **MS. BAUGHMAN:** That's three.

6 Number four, we have been told that despite the fact  
7 that Dr. Spiliotopoulos wrote in his report that he was relying  
8 on summaries of interviews, in fact, that was from some sort of  
9 template that he used for his report, and, in fact, there are  
10 no such summaries. That's part of multiple lines of inquiry of  
11 why are there things in his report that he doesn't know about,  
12 that he couldn't back up at his deposition, and that's in his  
13 report, but now they're saying, well, that was from a template;  
14 he didn't really have any witness summary. So they're saying  
15 it doesn't exist. So number four goes away based on that.

16 **THE COURT:** All right. Mr. Bain?

17 **MR. BAIN:** Yes, Your Honor.

18 On the billing records, as you mentioned, there are  
19 two parts of that. With respect to the billing records for  
20 this case, we're looking into presenting or providing more  
21 detailed information that the Plaintiffs are seeking and will  
22 be doing that this week.

23 With respect to the old work which was not related to  
24 this case but was for prior litigation, we're looking at  
25 providing some basic information, but not the detailed billing

1 records. We think that goes beyond what should be provided.  
2 It was not for this case, which is what Rule 26 is limited to.

3 The notes -- and we can get into some of this in  
4 chambers because it is related to this email that Mr. Dean has  
5 provided to you about whether or not these particular experts  
6 were involved in litigation at the time. But our position is  
7 that they are protected work product information because the  
8 experts were involved in consulting for litigation at that  
9 time.

10 Moreover, CMO-17 protects notes of experts if they  
11 are not the only document relating to facts that are otherwise  
12 available to them. Mr. Spiliotopoulos was at a meeting of  
13 ATSDR taking notes. The meeting was transcribed. The  
14 Plaintiffs have access to that meeting transcription. So they  
15 know what occurred at that meeting. Dr. Spiliotopoulos' notes  
16 were just notes of that meeting and his impressions, which are  
17 protected. And it's protected not only by attorney work  
18 product but by CMO-17. The Plaintiffs relied on CMO-17 for  
19 protecting their own experts' notes.

20 With respect to the notes that Mr. Spiliotopoulos  
21 referred to in his report, he did make a mistake that there  
22 were interview notes that he did not have. Plaintiffs' experts  
23 had made mistakes about similar things, such as that their own  
24 expert looked at their own historian's report, and he did not.

25 So these are just the errors that occur when you are

1 producing a lot of reports over a short period of time.

2 **MS. BAUGHMAN:** Your Honor, may I briefly respond?

3 **THE COURT:** Yes, ma'am.

4 **MS. BAUGHMAN:** Okay. The statement that there are  
5 other records of what was said at that meeting in 2005 is true,  
6 but the protection that is claimed is only if that document is  
7 work product, okay. And what we're saying is we don't think  
8 it's work product.

9 And Dr. Spiliotopoulos testified -- and this is on  
10 page 118 of his deposition, lines 3 through 7. He was asked:  
11 "You don't know whether or for what reason Dr. Hennet asked you  
12 to be at that expert panel meeting, whether it is for  
13 litigation or something else; right?" His answer: "I have no  
14 idea."

15 So I don't see how him attending that meeting could  
16 be for litigation if he didn't even know that he was there for  
17 litigation. And it may be that the thing to do here would be  
18 for the DOJ to provide a privilege log that identifies these  
19 documents, to and from, like who wrote it, who received it, the  
20 CCs, and what litigation specifically this was done in  
21 anticipation of, which case, because I don't think there is a  
22 broad, you know, you can hire an expert and let them do  
23 anything they want to do and then later say it was for  
24 litigation.

25 In another vein, DOJ has said, well, these were part

1 of an expert report. These were notes that were part of an  
2 expert report, but which expert report, because he didn't even  
3 know he was there for litigation. So we don't know which  
4 litigation or which report or whose report, because he's never  
5 been retained as an expert except, he said, in 2022 or '23 for  
6 this case.

7 With respect to CMO-17, my interpretation of CMO-17  
8 is that's talking about work done and notes taken for this  
9 litigation, not notes that the expert had done 15 years ago,  
10 okay.

11 So -- and we did cite case law, admittedly from the  
12 Ninth Circuit, saying that experts' notes and memorandum, or  
13 whatnot, are not covered by work product where it wasn't done  
14 as part of the report and for litigation. You can't just say  
15 all the work the expert ever did that's relevant and related to  
16 the case is work product. It has to be specifically done in  
17 anticipation of specific litigation and for that report.

18 And there's no -- we haven't been told which report,  
19 which litigation for -- by which expert. He didn't write a  
20 report until 2024 or '5.

21 **THE COURT:** Okay.

22 **MR. BAIN:** One thing I would say, Your Honor, is the  
23 representation that he didn't know what he was going there  
24 for -- he was very junior at the time. He was sent by the  
25 people we have hired as retained experts to go to this meeting

1 and take notes 20 years ago.

2           **THE COURT:** I'm going to have to have a lot more  
3 information. You all are much more informed on this than I am.  
4 And so to make a decision on this, I'm going to have to have a  
5 lot more information, whether that's through a privilege log or  
6 whether it's briefing.

7           Tell me what you think.

8           **MS. BAUGHMAN:** Your Honor, I would suggest as an  
9 initial matter, there'd be a privilege log. And then that may  
10 resolve it. And if it doesn't resolve it, then we could file a  
11 motion.

12           **THE COURT:** Okay. I would like to know what I'm  
13 looking at, though.

14           **MR. BAIN:** Your Honor, I think we could discuss this  
15 a little more in chambers and give you a little more  
16 information, and then we can decide where to go from there.

17           **MR. DEAN:** All of this kind of ties together. I  
18 think in ten minutes we can tell you what's going on.

19           **THE COURT:** Okay.

20           **MS. BAUGHMAN:** Your Honor, just to be clear, I have  
21 another issue that's not related to those four.

22           **THE COURT:** Right.

23           **MS. BAUGHMAN:** And I don't know if you want to hear  
24 oral argument. At the last status conference, I was on the  
25 phone, and we discussed this issue of Dr. Hennet having gone to



1 Camp Lejeune and done a significant amount of work that he's  
2 now relying on as a basis for his opinions in this case. And  
3 you suggested --

4 **THE COURT:** You've got a motion.

5 **MS. BAUGHMAN:** -- that we file a motion. We did file  
6 a motion.

7 **THE COURT:** Yeah.

8 **MS. BAUGHMAN:** It's fully briefed. I don't know  
9 whether the Court wants oral argument, but I'm prepared to  
10 argue it today. And I believe that DOJ represented that it  
11 would be prepared to argue as well.

12 **THE COURT:** Okay. Otherwise, you're done with  
13 your --

14 **MS. BAUGHMAN:** Yes, sir.

15 **THE COURT:** What have you got?

16 **MR. BAIN:** Mr. Carpenito has a few items to address,  
17 and then Ms. O'Leary is here if you want to have an argument on  
18 that motion.

19 **THE COURT:** Okay. We'll go to Mr. Carpenito. You  
20 can go first.

21 **MR. CARPENITO:** Thank you, Your Honor.

22 Just one point with respect to something Mr. Roberts  
23 stated at the beginning. I believe he said that PLG was  
24 supplementing the DPPFs quarterly. The parties' agreement was  
25 that PLG is supplementing a spreadsheet quarterly. When we

1 attempted to ask for supplemented DPPFs quarterly, PLG  
2 responded that that was too burdensome. So that's how we  
3 reached the agreement with respect to an updated spreadsheet.  
4 PLG provided that first update April 10, and I believe an  
5 updated DPPF will come one time closer to trial. So I just  
6 wanted to make sure that the record accurately reflects that  
7 agreement.

8           Next, if I may, with respect to the Mousser case,  
9 which is the kidney cancer Plaintiff --

10           **THE COURT:** Right.

11           **MR. CARPENITO:** -- who was recently diagnosed with  
12 bladder cancer, Mr. Roberts is correct; we did respond to PLG  
13 last Friday with our proposed timeline. The only thing I'd  
14 like to note for the Court, Your Honor, is we are not yet sure  
15 whether PLG intends to submit rebuttal reports to our  
16 supplemental reports, and that may disrupt deposition timing.  
17 Obviously, we have not crossed that bridge at this time. I  
18 just wanted to raise that for the Court.

19           **THE COURT:** Okay. Is that it for you?

20           **MR. CARPENITO:** Your Honor, if I may, at the last  
21 status conference, the United States did raise its intention to  
22 propose a deadline for final expert supplementation. We had a  
23 meet-and-confer with PLG on this issue on April 16th, during  
24 which the United States proposed setting a supplementation  
25 deadline for expert causation opinions --

1           **THE COURT:** Right.

2           **MR. CARPENITO:** -- that would not impact the overall  
3 discovery schedule. PLG acknowledged that the discussion was  
4 beneficial, but that it was premature to set such a deadline at  
5 this time.

6           So the parties will continue to engage on that issue,  
7 and I just wanted to make the Court aware of that.

8           **MS. BUTLER:** Your Honor, I can address that if you  
9 want to hear more. That's an ongoing issue. As Mr. Carpenito  
10 stated, we reached an agreement with DOJ on the DPPF  
11 supplementation. We have a spreadsheet.

12           **THE COURT:** Right.

13           **MS. BUTLER:** We supplemented it April 10. We're  
14 doing that every quarter for so long as this case goes on with  
15 a final supplementation of the DPPF 120 days before trial.

16           Separate from that, the DOJ had requested that there  
17 be essentially a cutoff after which these Plaintiffs, who have  
18 obvious serious health issues and ongoing diagnoses, treatment,  
19 and additional diagnoses -- that there be some sort of cutoff  
20 after which they can't recover. And we have rejected that, but  
21 we are in ongoing negotiations about how to deal with that. I  
22 don't think there is any issue before the Court right now that  
23 happens --

24           **THE COURT:** Well, yeah, I think it was in the future  
25 expert supplementation portion of the status report.

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1           **MS. BUTLER:** That's -- they wanted a date after which  
2 no additional medical issues could be considered so that --

3           **THE COURT:** Right.

4           **MS. BUTLER:** -- they could supplement reports.

5           **THE COURT:** Right. And you all said that it would be  
6 resolved through the normal course and appropriate procedures.  
7 And my notes were what are -- what is the normal course to  
8 address this and the appropriate procedures.

9           **MS. BUTLER:** Well, I mean -- and Mr. Ellis and  
10 Mr. Roberts can address this as well. But this is an ongoing  
11 issue in cases involving, you know, ongoing health issues, and  
12 it's addressed in the normal course through supplementation.  
13 And if an additional hour needs to be taken for -- it would be  
14 addressed on a case-by-case basis, and it kind of depends. Is  
15 there another Mr. Mousser situation, you know, where you have a  
16 kidney cancer plaintiff who has additional serious, serious  
17 health issues, or is it something more minor that can be  
18 addressed in another manner? You just address it case by case,  
19 depending on the issues, and hopefully agreement can be  
20 reached.

21           But we don't think that the Plaintiffs should be cut  
22 off from presenting damages based on ongoing health issues, and  
23 that's really the rub.

24           **MR. CARPENITO:** Your Honor, may I respond?

25           **THE COURT:** Sure.

1           **MR. CARPENITO:** We do not dispute supplementing with  
2 respect to the Plaintiffs' evolving conditions for damages  
3 purposes, but what we did propose in this meet-and-confer was  
4 with respect to causation opinions. So I do want to make that  
5 distinction for the record.

6           We also discussed during that meet-and-confer, as  
7 Ms. Butler noted, the potential for a case-by-case review.  
8 During the March 25th hearing, the Court seemed interested in  
9 setting certain deadlines, and so we were trying to come to an  
10 agreement to expedite things. But, certainly, we would be open  
11 to a discussion in another case such as Mr. Mousser's. But,  
12 openly, we cannot agree to something like that until we were  
13 confronted with such. But we were just trying to come to an  
14 agreement on the front end.

15           **MS. BUTLER:** Well, we've already agreed as part of  
16 the DPPF agreement that we've addressed before this Court that,  
17 you know, any requests to reopen depositions, you know, any  
18 requests for further supplementation of reports we'll address  
19 on a case-by-case basis.

20           I mean, without a trial date being set and not  
21 knowing how far into the future we're looking, it's really hard  
22 to set a deadline. And I don't think the Plaintiff should be  
23 precluded from having their experts or their damages consider  
24 ongoing health issues. So I think at this point we have an  
25 agreement to discuss things on a case-by-case basis. That's

1 what we've been doing.

2 **THE COURT:** This has just been limited to Mr. Mousser  
3 at this point; correct?

4 **MS. BUTLER:** Correct.

5 **THE COURT:** Okay.

6 **MS. BUTLER:** But should another Mr. Mousser come up,  
7 we'll address it in a similar fashion. We just -- we really do  
8 not believe there should be a cutoff date for ongoing health  
9 issues.

10 **THE COURT:** Okay. All right.

11 Did we talk about clawback?

12 **MR. CARPENITO:** Your Honor, if I may, that was what  
13 we were going to address in chambers.

14 **THE COURT:** Okay. All right. I was just going  
15 through my notes here.

16 Were the parties rethinking disease selection for  
17 Track 3? I think Mr. Bell mentioned last time rethinking  
18 diseases for Track 3.

19 **MR. BAIN:** Mr. Bell did raise that at the last status  
20 conference. He has not reached out to us yet about that.

21 **THE COURT:** Okay. The Court is interested in disease  
22 census information for claims to the DON. I guess that would  
23 come from you guys?

24 **MR. BAIN:** Yes. Would you like that submitted before  
25 the next status conference?

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1           **THE COURT:** That would be great, as well as  
2 complaints filed in court.

3           **MR. BAIN:** I think Mr. Bell said he had that  
4 information.

5           **THE COURT:** So the Court would like that information.  
6 Okay. I think I'm ready to hear from Ms. Baughman  
7 on --

8           **MS. BAUGHMAN:** Thank you, Your Honor.

9           **THE COURT:** -- the site visit.

10          **MS. BAUGHMAN:** Yes. So Plaintiffs have filed a  
11 motion, and there's been a response. I am going to be  
12 referring to some of the exhibits to the motion. I think I  
13 have some of them in hard copy here, if the Court wants them.  
14 But let me just --

15          **THE COURT:** Are they already submitted?

16          **MS. BAUGHMAN:** They've been submitted. The only one  
17 that hasn't, if I could approach, Your Honor, and provide it,  
18 is the -- actually, no, it's submitted as part of the DOJ's  
19 response. Dr. Sabatini's deposition was taken after the  
20 Plaintiffs filed their motion but before the DOJ filed its  
21 response, but that was provided with DOJ.

22                 So with that, then, the Court has everything already.

23          **THE COURT:** Okay. I am going to give my outline for  
24 this discussion after reading the briefing, and here it is:

25                 Ask the parties to summarize their respective

1 positions.

2 Two, what is the core factual dispute?

3 Three, is it just a disagreement over the water fall  
4 height at the Hadnot Point's spiractor effluent pipes? Is this  
5 just a subjective question or is it objective? So which  
6 measurement is correct?

7 Plaintiffs originally proposed a compromise whereby  
8 Dr. Sabatini was allowed a similar site visit to Dr. Hennet's  
9 visit in February 2025. Is this still adequate relief to solve  
10 the dispute?

11 And then does either party plan to file a motion to  
12 seal either of the proposed sealed exhibits?

13 **MS. BAUGHMAN:** Okay. Let me start with -- I am going  
14 to start with the question that you asked about is Dr. Sabatini  
15 going to the site -- would that solve the problem. The issue  
16 with that is the schedule that we have here. Plaintiffs asked  
17 for the visit to occur before Dr. Sabatini was going to be  
18 deposed so that, just like Dr. Hennet, he could rely on what he  
19 saw in his deposition testimony so that he could see what  
20 Dr. Hennet saw, speak to the people Dr. Hennet spoke to,  
21 observe the things Dr. Hennet observed, et cetera. And the DOJ  
22 said no to that.

23 So what has happened in the meantime -- we had three  
24 weeks to get that done when we asked for it. It could have  
25 happened. They said no. They said, well, we want two



1 unrelated depositions in exchange, which has nothing to do with  
2 this issue. All we were trying to do is get on the same  
3 footing as Dr. Hennet, and they said no.

4           So what happened then is because we have a schedule  
5 in place that all leads up to *Daubert* motions, which are due  
6 tomorrow, okay -- ours on their experts and theirs on ours are  
7 due tomorrow -- we produced Dr. Sabatini for his deposition.  
8 So at this point I think it's too late. I don't see how  
9 allowing Dr. Sabatini out there -- unless we then push back the  
10 *Daubert* briefing on Dr. Sabatini and Dr. Hennet, allow the site  
11 visit, have new deposition of Dr. Sabatini based on what he  
12 observed, and then have the briefing, which we think it's --  
13 there is no reason to do that.

14           DOJ had an opportunity to cure what it did in  
15 violation of this Court's scheduling order, and they chose not  
16 to, right. We have a scheduling order. It said when  
17 Dr. Hennet's report was due. It was due December 9. And that,  
18 according to the federal rules, meant that his opinions and the  
19 bases for his opinions needed to be in that report.

20           And I want to be very clear about something.  
21 Dr. Sabatini did not introduce anything new that Dr. Hennet  
22 wasn't already aware of regarding this one-foot fall, okay,  
23 because the thing is, in Dr. Hennet's report, he puts a figure  
24 in there, all right. And that figure is from the AH  
25 Environmental report.

1           So if we go back in time, in 2004, the Navy and the  
2 Marines were saying, you know what, we think all of this was  
3 resolved by volatilization at the treatment plant. And so they  
4 hire AH Environmental, which is the Navy and Marines'  
5 consultant, not ATSDR's consultant, to go out and investigate  
6 this and write a report about what the extent of volatilization  
7 of these chemicals would have been at the treatment plant; in  
8 other words, how much of it escaped just into the air based on  
9 what they did at the water treatment plant.

10           AH Environmental did that, and they wrote up a  
11 report. And everybody has that. It's from 2004. And it is  
12 relied on by Dr. Hennet in his December report, including a  
13 schematic from AH that says there was a one-foot drop.

14           And even more importantly, in that same report -- and  
15 let me be clear for the record. The AH Environmental report is  
16 Exhibit 3 to Plaintiffs' motion. And the schematic that I am  
17 referring to that says it was a one-foot drop is on page 3-10,  
18 and that very same schematic shows up exactly verbatim in  
19 Dr. Hennet's December report as -- which is Exhibit 1 to  
20 Plaintiffs' motion on page 5-4, showing the one-foot drop.

21           Then, even more importantly, in the AH report, which  
22 is Exhibit 3, on page 4-2, AH Environmental explained that  
23 there was a big difference in the drop at Hadnot Point versus  
24 Holcomb Boulevard. Why is that important? Because Dr. Hennet  
25 had this report when he wrote his report in December, and he

1 knew that the Navy's own expert was -- or consultant was saying  
2 there's a big difference. Even though the spiractors are the  
3 same at Holcomb Boulevard and Hadnot Point, the drop is  
4 different, and the drop is different because there is a  
5 recarbonation basin right after the spiractors at Hadnot Point  
6 that does not exist at Holcomb Boulevard. And AH Environmental  
7 said why that's important is there is only going to be a  
8 one-foot drop because of the backup in the water from that  
9 recarbonation basin at Hadnot Point as compared to Holcomb  
10 Boulevard.

11           And I'm just going to read this sentence because it's  
12 so clear. They said, AH Environmental, on page 4-2 of  
13 Plaintiffs Exhibit 3: "Because of the downstream recarbonation  
14 basin at that plant, the available head does not appear to  
15 allow a fall height of greater than approximately one foot and  
16 the effluent pipe is likely to be flowing full. However, at  
17 the Holcomb Boulevard water treatment plant, because of the  
18 absence of a recarbonation basin, water falls approximately  
19 two feet to the bottom of the horizontal pipe section..."

20           So this difference between the two plants was set out  
21 in a document that Dr. Hennet had, and Dr. Hennet testified  
22 that he was aware of this. And he asked before his report that  
23 he could get a measurement of the drop at Hadnot Point, and he  
24 didn't do it. And, instead, he relied on Holcomb Boulevard.

25           So on that issue, Your Honor, Dr. Sabatini didn't

1 raise something new that, all of a sudden, Dr. Hennes needed to  
2 go and check out after all of the reports were done. He was  
3 aware of it beforehand, and he chose to ignore that and just go  
4 with the two-foot and not to do a measurement at Hadnot Point.  
5 So this isn't something newly raised by Dr. Sabatini.

6           And the other issue -- I know you didn't raise this,  
7 but the DOJ did. The other attempted excuse that DOJ tries to  
8 give for why they had to go out in February and do this new  
9 site visit and new collection of information and data was that  
10 there were these two affidavits from two Plaintiffs about the  
11 use of the water buffaloes and how they were filled.

12           And let me be very clear about this. There's a big  
13 distinction between knowing that there are multiple ways to  
14 fill water buffaloes and how frequently one way was used versus  
15 the other, okay.

16           So a water buffalo, in case you don't know, is this  
17 is a big tank that you can move around the site and provide  
18 water where there isn't water where the Marines were training  
19 and doing other activities, okay. So you can fill it different  
20 ways. You can fill it through this little valve that has a  
21 strainer, right, or you can go to the top and there is a  
22 manhole, right. You can open it, and you can fill it that way,  
23 all right.

24           The instructions provided by the Army for how to fill  
25 these changed over time. And their historian, DOJ's historian,

1 had pictures and had instruction manuals in the report -- in  
2 its report about that, okay. Dr. Sabatini didn't make up the  
3 instructions. The instructions existed before December of 2024  
4 when Dr. Hennet issued his report. Dr. Hennet offered a report  
5 solely about how much volatilization there would be if you go  
6 through that little spigot with the strain; didn't mention  
7 anything at all about how much volatilization there would be if  
8 you go through the manhole, okay.

9           Now, if you look at Dr. Sabatini's report, which is  
10 Exhibit 5 of the Plaintiffs' motion, there is an appendix -- he  
11 has an appendix called the "Water Buffalo Appendix" to his  
12 report, again part of Exhibit 5. On page 4 of that appendix,  
13 there's information about a World War II era water buffalo that  
14 says there that you can fill it through the cover. You can do  
15 it either way, two ways to fill the water buffalo, okay. And  
16 cited in support of that is a document, BRIGHAM\_USA Bates  
17 number, which means that's their historian's document showing  
18 that it says on the water trailer the manhole cover should be  
19 kept closed and held down tightly with the wing nut, except  
20 when tank is being filled through this cover. That's in their  
21 only document that they had before December of 2024 when they  
22 provided their reports.

23           Then on pages 14 and 16 of the water buffalo  
24 appendix, there are additional technical manual documents, one  
25 from 1972 and one from 1985, that instruct when that you're

1 filling the water tank, you should open the manhole cover and  
2 make sure the tank is clean, flush the tank, and then fill it,  
3 okay.

4           So that's -- those are the instructions. Those are  
5 the facts. Dr. Sabatini didn't make this up or provide  
6 anything new, right. The fact that there are two affidavits  
7 saying, yes, in the late 1960s we were filling through the  
8 manhole cover, okay, whether those two individuals saw this and  
9 what they observed doesn't change the fact that these  
10 instructions existed, that the relevant time period here  
11 includes 1972 through 1985, that the instructions said to fill  
12 through the manhole in 1972.

13           So Dr. Hennet had or should have had all of that  
14 information before he provided his report. He chose to only  
15 provide a calculation about how there's volatilization, one  
16 method of filling, not the other method of filling.

17           Dr. Sabatini then provides an opinion about both  
18 methods of filling, okay. And then Dr. Hennet realizes he  
19 didn't include that. So he wants to go back and observe  
20 filling through the manhole cover and then provide us with  
21 notes, which are attached to -- the two pages of notes are  
22 attached to Plaintiffs' motion as -- that's Exhibit 6. Those  
23 are the two pages of his notes that the DOJ claims need to be  
24 sealed.

25           To answer your question about that, we don't think

1 there's any reason to seal those. So if there needs to be a  
2 motion to seal, that should be filed by the DOJ. We were just  
3 respecting their position on that by filing it under seal.

4           So let me go back. Dr. Hennet did a lot -- what I'm  
5 trying to say about those two things, the two excuses that DOJ  
6 is giving that everything -- these were new things that they  
7 needed to go look at, they were aware of or should have been  
8 aware before. They knew about the one-foot drop. They should  
9 have known about multiple ways to fill the manhole. They only  
10 covered one way. That's on them, okay.

11           So what else did Dr. Hennet do when he went out  
12 there? He didn't just address those things. He also took 100  
13 photos. He also met with base personnel and questioned them  
14 about things like how often -- how big were the water  
15 fluctuations. And we don't know, frankly, all of the things he  
16 asked them because he didn't provide -- if he was going to do  
17 this, he should have provided a supplemental report, because  
18 I'm going to get to how are we prejudiced here.

19           We are prejudiced because the federal rules say you  
20 have to put the basis for your opinions in your report. Now  
21 he's gone out there and collected 100 -- taken 100 photos, made  
22 measurements, interviewed personnel. He said he had a  
23 30-minute meeting where he talked to five different people. He  
24 doesn't know who they were. He doesn't know what their  
25 positions were. He doesn't know how long they were there. But

1 he's relying on this as new information for his opinions.

2 He also viewed -- there was a monitor that had  
3 information about fluctuations of water. Now, it only had it  
4 for, I think, the last -- relevant to the last seven days of  
5 how much the water had fluctuated in different tanks, but he  
6 looked at that. He didn't take pictures of it. We don't know  
7 what it said, but he's relying on it for his opinions.

8 All of that, Your Honor, under the federal rules  
9 should have been in his report. And so what that means is when  
10 he testifies at a hearing or at a trial, if he's allowed to  
11 rely on what he did in February, we don't know what he's going  
12 to say. We don't know what he's going to pull out of his hat  
13 that someone told him there or that -- some measurement he took  
14 that we don't know about or something he saw on the screen  
15 because he didn't put it in his report, which is what's  
16 required under the rules.

17 He also said, you know, in his deposition, when he's  
18 talking about what he did out there --

19 **THE COURT:** So this wasn't in his report; correct?

20 **MS. BAUGHMAN:** Nothing regarding what he did in  
21 February 2025 is --

22 **THE COURT:** But this came out in his deposition;  
23 right?

24 **MS. BAUGHMAN:** Yes. Yes. Yes. But we -- to be very  
25 clear, we didn't have time to ask him about everything everyone



1 said, what all of the 100 photos were of because we only had  
2 seven hours. And he just -- we don't know the extent of what  
3 he did and what he's relying on because we don't have it in a  
4 report, okay. That leaves him free to just throw anything out  
5 at any time in support of his opinions and we won't know.

6 Another thing is he went around and he said he  
7 observed turbulence and the bubbling of the tanks. That's in  
8 his notes that are sealed as Exhibit 6. Again, there's no  
9 reason that he couldn't have seen that and put it in his report  
10 earlier.

11 So going to what the DOJ claims, they say, well, it's  
12 new -- it wasn't new. I've covered that -- and that we're not  
13 prejudiced because of this. We are prejudiced. It wasn't  
14 harmless, and the reason why is because I've explained that we  
15 don't know how that affected the basis of his opinions. He  
16 has -- and he has new opinions. His new opinions are he's  
17 going to opine about the extent of the volatilization through  
18 the manhole.

19 **THE COURT:** Well, I'm sure you asked him about this  
20 in his deposition, didn't you?

21 **MS. BAUGHMAN:** But he didn't do a calculation.

22 We don't -- you know, and the other thing is that he  
23 made new measurements and just -- the case law on this, Your  
24 Honor, from this Court and from the Middle District of North  
25 Carolina cited in Plaintiffs' motion, the Akeva case and the

1 *Severn Peanut* case, talk about how you're not allowed -- I'm  
2 sorry. Let me get to this.

3 In *Akeva*, the expert tried to supplement their report  
4 with the results of an additional test after the expert report  
5 had been provided. And the court said: "This Court" cannot  
6 allow -- "'cannot accept a definition of supplementation which  
7 would essentially allow for unlimited bolstering of the expert  
8 opinions.'" To construe supplementation to apply whenever a  
9 party wants to bolster or submit additional expert opinions  
10 would reek" [sic] "havoc on docket control and amount to  
11 unlimited expert opinion preparation."

12 Similarly, in *Severn Peanut*, this court said that  
13 "appropriate supplementation occurs when the previous  
14 disclosures 'happen to be defective in some way so that the  
15 disclosure was incorrect or incomplete and, therefore,  
16 misleading,'" focused on "misleading." You're only allowed to  
17 correct something that's misleading. You're not supposed to go  
18 back and correct a mistake where you should have covered  
19 something or should have made a measurement or you should have  
20 talked about the manhole opening, and you missed it, so you're  
21 going to go back and correct it. That's not what 26(e) is  
22 supposed to cover. So we're prejudiced.

23 We've already taken the depositions, right.  
24 Dr. Sabatini has been deposed. Dr. Hennessey has been deposed.  
25 Our motions are due tomorrow for *Daubert* on these experts. And

1 they just went and flouted the Court's order. And they could  
2 have raised it with the Court. They could have raised it with  
3 us. We could have negotiated something where both experts  
4 could go out there, maybe even at the same time. But they  
5 didn't in violation of the Court's order and then wouldn't  
6 allow us to do the same thing where there was time, where  
7 Dr. Sabatini could have gone before his deposition.

8           So the prejudice to us is both his new opinions,  
9 right, new opinions on volatilization via the manhole, new  
10 opinions -- and providing a new measurement that he didn't have  
11 before, and that this is unlimited bolstering basis in his  
12 report via the rules.

13           **THE COURT:** Okay. This is not new. We were talking  
14 about this the last time and maybe the time before that. So  
15 why couldn't you have done something before today? You got  
16 reports due tomorrow.

17           **MS. BAUGHMAN:** *Daubert* motions are due tomorrow.

18           **THE COURT:** Yes. So why couldn't you all have worked  
19 this out a month ago or six weeks ago?

20           **MS. O'LEARY:** Allison O'Leary for the United States,  
21 Your Honor.

22           We did try and work this out when this issue came up  
23 from the Plaintiffs, specifically this dispute. We believe  
24 that this is a late request that came after the close of  
25 Phase I discovery for a site visit that they could have made

1 when they received Dr. Hennet's report or in the years that  
2 they had retained Dr. Sabatini before they even received  
3 Dr. Hennet's report.

4 I think the issue here is that the Plaintiffs simply  
5 don't want the Court to consider relevant information because  
6 it's unfavorable to them.

7 Their argument is that Dr. Hennet's site visit  
8 information was disclosed after the Court's case management  
9 order for 26(a) expert disclosures. There's no dispute that  
10 that is true. But the Plaintiffs have argued that because it  
11 would not be justified independently under Rule 26(e), it's not  
12 allowed and the Court must exclude it. And that's where the  
13 argument is flawed.

14 An argument that some sort of information was not  
15 disclosed as it was required to be under 26(a)  
16 (inaudible/coughing) materials in compliance with the deadline  
17 for those materials under the case management order as governed  
18 by 37(c), which looks at whether the party who received the  
19 late materials was harmed and if the reason was substantially  
20 justified. And the test for looking at that is the *Southern*  
21 *States* five factors from the Fourth Circuit, and all of those  
22 factors favor allowing Dr. Hennet to rely on the information he  
23 learned in his February site visit.

24 The first of those factors is surprise. And surprise  
25 here is very limited. Dr. Hennet did no new calculation. He

1 changed no opinions, though he was asked about that several  
2 times at deposition and was very consistent. He didn't do new  
3 experiments. He just took two new measurements, and those  
4 measurements, one of which was at the fall height of the  
5 spiractors, confirmed his existing opinion about that height,  
6 and the other, which was the timing to fill a water buffalo  
7 through a different method than had been in his report, he  
8 agreed with the Plaintiffs' experts.

9           Other things that Ms. Baughman brought up was that he  
10 observed venting and learned about fluctuations in the heights  
11 of water in reservoirs. And Dr. Sabatini, the Plaintiffs'  
12 expert, testified in his deposition that he assumed those  
13 things were true, that those were normal and expected in a  
14 water treatment plant.

15           In general, just to frame for Your Honor what sort of  
16 information it is we're talking about from this site visit, it  
17 is, one, the measurement of the fall height at a spiractor,  
18 which is used by both Dr. Sabatini and Dr. Hennet for  
19 calculating the UFC losses in that treatment process. And both  
20 Dr. Sabatini and Dr. Hennet agree on the method for calculating  
21 that. So the only dispute between them is what that fall  
22 height is, which is an input parameter for that calculation.

23           The other information about venting and reservoirs  
24 and water towers, about bubbling or turbulence at different  
25 aspects of the water treatment plants and the reservoirs and

1 fluctuations in the height of storage reservoirs, there are no  
2 measurements used in any calculations. These are not input  
3 things, and these, again, are things that the Plaintiffs'  
4 expert assumed existed.

5           At the water buffalo, Dr. Hennet timed the filling of  
6 it and observed turbulence and splashing during that process.  
7 That is the extent of what he learned at his site visit.  
8 Dr. Sabatini had observed YouTube videos of the same thing and  
9 disclosed those in the materials-considered list for his  
10 report, and Dr. Hennet agrees on the time that Dr. Sabatini  
11 had.

12           In terms of the cure, which is the second factor  
13 under the *Southern States* setup, the Plaintiffs had the  
14 photographs and Dr. Hennet's notes from his site visit more  
15 than three weeks before his depositions. They had time to  
16 prepare and, in fact, did and asked Dr. Hennet extensive  
17 questions about what he had done at his site visit and what he  
18 had learned. They did not ask for additional time at his  
19 deposition prior to that deposition, though they received the  
20 materials three weeks early.

21           And they have proposed prejudice in the fact that  
22 they had to spend time asking him about the site visit, and  
23 that is an unsound argument. Dr. Hennet visited Camp Lejeune  
24 two times previous to his February site visit, and the  
25 Plaintiffs had to ask him about those site visits as well, or

1 at least they felt the need to. Whether they had to ask him  
2 about the site visit or not depends on their analysis of the  
3 case and not the timing of that site visit. Just like his site  
4 visit in May of 2024 was asked about, so was the other one.

5 The third factor is whether it will disrupt the  
6 trial. And we have no trial date, no hearing date. And  
7 Dr. Hennet's site visit did not even disrupt the Phase I  
8 scheduling order because the United States worked quickly when  
9 it received Dr. Sabatini's report to schedule Dr. Hennet's site  
10 visit so that he could confirm the issues he needed to and  
11 provided that information to the Hennets -- or to the  
12 Plaintiffs well before Dr. Hennet's deposition.

13 The fourth factor is the importance of the evidence.  
14 And on the spiractor fall height measurement, that is the  
15 dispute between the parties on losses at storage and water  
16 treatment. And both parties' experts agree that the losses at  
17 the spiractor are the largest share of treatment and storage  
18 losses. They agree on the method, as I mentioned. This is  
19 purely a factual dispute about the height.

20 And I should add, too, though Dr. Hennet has a  
21 measurement that he took from February and it confirmed what he  
22 had assumed based on information about the similarities between  
23 the fall height that had been measured at another plant and the  
24 Hadnot Point one, Dr. Sabatini testified that he did not think  
25 he needed to go to Camp Lejeune for a site visit. He didn't

1 agree with the manner that Dr. Hennet had taken the measurement  
2 of this fall height, and he could not identify a way that he  
3 would take such a fall height, which would be difficult. It  
4 would involve trying to somehow measure inside an operating  
5 pipe.

6           In terms of the reasons that the United States did  
7 this measurement, which is the fifth factor, as I've already  
8 explained, the fall height is central to this -- to an  
9 important calculation on losses, and there is no methodical  
10 dispute.

11           And in terms of the filling of the manhole cover,  
12 this is the result of the Plaintiffs' late disclosures. And I  
13 want to make sure that the Court is not misled on what was  
14 disclosed with Dr. Sabatini's report. Dr. Sabatini's report  
15 was accompanied by two affidavits from Plaintiffs, one of which  
16 said that despite the instructions for these water buffalo  
17 saying to fill them one way, they were filled another way.

18           So Dr. Hennet with this information, which had not  
19 been disclosed and which should have been disclosed more than a  
20 year earlier when the United States sent contention  
21 interrogatories asking the Plaintiffs to identify the evidence  
22 they were relying on related to water buffalo -- Dr. Hennet  
23 then undertook to observe this method of filling that the  
24 Plaintiffs disclosed for the first time with Dr. Sabatini's  
25 report was the only way that water buffaloes had been filled.



1 I also want to note, too, that the United States has  
2 not cross-moved to exclude any of the Plaintiffs' many late  
3 disclosures in Phase I because our understanding is that,  
4 looking at these factors from *Southern States*, with the  
5 exception of a very recent one, we don't think that it's  
6 appropriate.

7 But Mr. Bain mentioned earlier whether any of the  
8 Plaintiffs' late disclosures had occurred after depositions,  
9 and I wanted to clarify that I believe Mr. Bain was referring  
10 to the Phase II. In Phase I, we have gotten multiple  
11 disclosures after depositions. I've mentioned a few in the  
12 United States' brief. When I mentioned the sensitivity  
13 analysis on biodegradation rate, that came after the deposition  
14 of Mr. Davis and at 10:45 the night before Mr. Jones. The  
15 supplement from those two experts came two weeks after both of  
16 their depositions.

17 And then Mr. Maslia disclosed during his deposition  
18 that he had done new calculations on a measurement of bias in  
19 one of the models, and that, though it had been requested, the  
20 notes on that were not disclosed until late last week. I  
21 believe it was Thursday evening. That is, in fact, a  
22 supplemental report including a new methodology that was  
23 applied in six calculations. And what the -- that came with an  
24 offer from the Plaintiffs to allow a one-hour deposition by  
25 Mr. Maslia on that, but such deposition would have to come

1 after the deadline for *Daubert* motions that Ms. Baughman said  
2 is prejudicing the Plaintiffs, which was not the case for them.

3 So PLG has been disclosing things frequently after  
4 depositions in Phase I and, in the case of Mr. Maslia's  
5 supplemental report received late last week, to the prejudice  
6 of the United States.

7 To address a few of the questions, if I haven't  
8 already, you raised Your Honor on whether this is a factual  
9 dispute or objective and subjective, in regards to the  
10 measurements, I think it's a factual dispute. It's objective,  
11 though there is a subjective part that won't be resolved by  
12 this, which is whether it's appropriate to measure the way that  
13 Dr. Hennet did or to measure a different thing that  
14 Dr. Sabatini described, but he could not explain how he would  
15 take such a measurement.

16 And whether the Plaintiffs are requesting a site  
17 visit, they did not include that in their motion. They have  
18 not said they're requesting it now. They did not request  
19 additional time for the deposition. They just want the Court  
20 not to consider the relevant evidence.

21 And in terms of the plan to seal the proposed  
22 exhibit, the notes from Dr. Hennet's site visit, I apologize if  
23 we needed to do something more. I understood that by not  
24 filing something that would indicate we were not seeking to  
25 seal it after a week. And so we're not seeking to seal, and

1 that is why we did not. If we need to say that affirmatively  
2 on the record, we're happy to do so.

3 **THE COURT:** No.

4 **MS. O'LEARY:** Thank you.

5 **THE COURT:** Thank you.

6 **MS. BAUGHMAN:** May I briefly respond, Your Honor?

7 **THE COURT:** Sure.

8 **MS. BAUGHMAN:** Thank you.

9 On the issue, very importantly, of whether there's  
10 still a dispute, you could call this a factual issue; but to be  
11 very clear, what Dr. Hennet did was made a measurement when the  
12 spiractor was not running. So there was no water in it, okay.  
13 So that's the same as what AH said. You know, there's going to  
14 be a two-foot drop if there's no water.

15 What Dr. Sabatini wanted to do, in light of the fact  
16 that Dr. Hennet went out there in February, is go out and look  
17 at the spiractor, both when it's running and there's water in  
18 it, which is what AH documented, and when it's dry, which is  
19 what Dr. Hennet did in February. We asked for both of those  
20 things, and that's documented in our motion, Exhibit 7, page 3,  
21 the letter asking for the site visit the day after we took the  
22 deposition of Dr. Hennet.

23 So if the Court were to deny the Plaintiffs' motion,  
24 that doesn't resolve this issue. There's still going to be an  
25 issue of one foot or two foot.

1           And to be clear, when the DOJ says, well, you know,  
2 they did a lot of things late and we're not filing a motion, so  
3 why did they file a motion, we were very clear in the same  
4 letter that's Exhibit 7 we will drop this if you let  
5 Dr. Sabatini go out there and do the same things that  
6 Dr. Hennessey did late in February. And they said no.

7           If the DOJ is really just trying to get at the truth,  
8 how big was the drop, then why not let Dr. Sabatini do the same  
9 thing out of time that Dr. Hennessey did out of time?

10           This seems like gamesmanship. It's like they go  
11 late. They violate the Court's order. Then when they're  
12 caught, they say, well, we'll only let you go out there and do  
13 exactly what our expert did if you give us two more depositions  
14 that are late that aren't even related to this issue.

15           **THE COURT:** So why not? Why not let him go out  
16 there?

17           **MS. O'LEARY:** Your Honor, because their expert said  
18 he doesn't need to go out there and that he doesn't know how he  
19 would take the measurement he says would be the only one that  
20 would be useful in terms of measuring the fall height, which is  
21 the only measurement where there's any dispute.

22           He said he assumed the venting and fluctuations and  
23 reservoir levels that Dr. Hennessey observed and learned from  
24 employees, and Dr. Hennessey, in measuring the fill time of a  
25 water buffalo, said that he agreed with the fill time that

1 Plaintiffs' expert, Dr. Sabatini, had observed in a YouTube  
2 video of the same.

3           There is nothing to be gained from a site visit.  
4 That's, I think, why the Plaintiffs are not requesting one.  
5 They don't want one. If they'd wanted one, they would have  
6 asked for one before Dr. Sabatini wrote his report or certainly  
7 after they received Dr. Hennet's report or certainly after they  
8 received Dr. Hennet's notes and photographs from his site visit  
9 three weeks before his deposition. They didn't. They waited  
10 until discovery was closed to request a site visit.

11           **MS. BAUGHMAN:** To be very clear, what Dr. Hennet did  
12 happened when discovery was closed. Discovery was closed six  
13 months before Dr. Hennet went out there.

14           And what -- and the DOJ is misrepresenting what --  
15 the answer you just got about why they didn't let Dr. Sabatini  
16 go out there, his deposition was taken three weeks after we  
17 asked for the site visit, and they said no. They can't be  
18 relying on what Dr. Sabatini said in his deposition for saying  
19 no to the site visit. We wanted the site visit before the  
20 deposition. Before the deposition, they said no. They didn't  
21 have a basis for not allowing Dr. Sabatini there except for to  
22 have these experts on unequal footing before this Court.

23           And to be clear, in Dr. Sabatini's deposition, which  
24 the Court has because it is attached to the DOJ's response to  
25 this motion, on page 75, he explained that he, in fact -- there

1 is a big distinction here, Your Honor. Let's be clear that  
2 Dr. Sabatini is only a rebuttal witness, okay. We got the  
3 DOJ's report on December 9th of 2024. His report was due  
4 January 14, 2025. In that month that he had, he did not  
5 believe he needed to go out and measure this fall drop because  
6 he was relying on AH Environmental's report, and he's still  
7 relying on AH Environmental's report. And that's what he said  
8 in his deposition.

9 But on page 75 of his deposition, he explained that  
10 he did want to go out and look at this site for these reasons:  
11 In response to Dr. Hennet's visit in February. That's why he  
12 wanted -- he said he wanted, quote, the same opportunity,  
13 quote. Both of that's on page 75.

14 He also explained: "I don't really know what exactly  
15 Hennet did and who he talked to and what he saw." So it would  
16 be to -- meaning why he wants to go out there, to have the same  
17 background information that he had.

18 Again, on page 76 and 77, he said: "I don't know  
19 what all he did or what all it meant." He said the same thing  
20 on page 322.

21 So he's saying he could do his calculations based on  
22 AH, but once Hennet went out there, he wanted the opportunity  
23 to do and see everything Hennet did. Now, had he figured out  
24 how he would measure it? No. He didn't have -- his site visit  
25 was denied. So he didn't figure out his methodology. But he

1 wanted to go out there, and he wanted to observe this, both  
2 when the spiractor was running, in other words, wet, and when  
3 it was dry. And the DOJ did not allow him to do that.

4           On a few other factor -- the issues on these factors  
5 that the DOJ talked about in argument, they're trying to say  
6 that the -- Dr. Hennet and Dr. Sabatini agree regarding this  
7 manhole issue, okay. I don't think -- I think, to be very  
8 clear, they don't agree on how much volatilization comes out of  
9 the manhole. And if they do, if what they're saying is  
10 Dr. Hennet, having gone and done his manhole experiment,  
11 filling the manhole and measuring timing and whatever, now  
12 agrees that Dr. Sabatini got it right on the amount of  
13 volatilization, then it's a nonissue. But that's not what  
14 they're saying. All they're saying is the timing of how long  
15 it took to fill it, they agree, how many seconds or how many  
16 minutes it took. They don't agree on how much volatilization.

17           What Dr. Hennet is trying to say is, based on what I  
18 saw that day, okay, it would be the same amount of  
19 volatilization no matter how you fill it. That is a new  
20 opinion that wasn't in his report in December, and he is not in  
21 agreement with Dr. Sabatini about that. They have very  
22 different numbers about how much volatilization there would be  
23 through the manhole. So they are not in agreement, and it is  
24 new.

25           Just going through my notes.

1           And then they're saying, well, what Dr. Hennet did on  
2 the fall height, he's just confirming something. But, again,  
3 he didn't -- he didn't take a measurement or even make an  
4 observation when it was running. So he's not confirming  
5 anything about the fall height when the spiractor is running.

6           They're saying that on the cure that that would have  
7 been -- I'm saying on the cure, it could have been cured. All  
8 this could have been cured if Dr. Sabatini had been allowed to  
9 go out there before his deposition, and he wasn't, okay. That  
10 was the cure, and the DOJ didn't allow that to happen.

11           Now, they say, well, it's not going to disrupt the  
12 trial; it's not going to disrupt the schedule and whatnot.  
13 Well, that's because we're prejudiced, right. We've continued  
14 with the schedule. Our team doesn't want to delay trials any  
15 more than they have already been delayed, but we're having to  
16 proceed without the site visit because they want to keep  
17 Dr. Sabatini not on the same footing as Dr. Hennet.

18           And the importance of the evidence -- they're saying,  
19 well, this evidence is important and whatnot. If they were  
20 trying to get at the truth, they would have allowed  
21 Dr. Sabatini to see the same thing as Dr. Hennet. If they  
22 weren't playing games, they would have let Dr. Sabatini out  
23 there.

24           **THE COURT:** Okay. I think I've got a good idea.

25           **MS. O'LEARY:** And, Your Honor, if I may, just one



1 thing I just wanted to clarify to correct the record?

2 Dr. Hennes's February site visit did not occur after  
3 the close of discovery. Phase I expert discovery closed in  
4 March. I think Ms. Baughman may have been referencing fact  
5 discovery is closed, but that is not Phase I expert discovery.

6 **THE COURT:** Okay.

7 **MS. O'LEARY:** Thank you.

8 **THE COURT:** We'll take a look at it. Thank you.

9 What's left? Just our in camera meeting?

10 **MR. BAIN:** Yes, sir.

11 **THE COURT:** Okay. And we'll talk also about  
12 scheduling our next conference. We'll get a notice out for  
13 that.

14 Okay. Thank you.

15 (END OF PROCEEDINGS AT 12:23 P.M.)

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER  
4  
5

6 I, Briana L. Chesnut, Official United States Court  
7 Reporter for the Middle District of North Carolina, certify  
8 that the foregoing transcript is a true and correct transcript  
9 of the proceedings in the above-entitled matter prepared to the  
10 best of my ability.  
11

12 Dated this 1st day of May 2025.  
13

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16 Briana L. Chesnut, RPR  
17 Official United States Court Reporter  
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